(5)

No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals, Division One

BRIEF FOR PETITIONER

GRANT WOODS
Attorney General of Arizona

C. TIM DELANEY
Solicitor General

PATRICK IRVINE*
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8384

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

45 pp

QUESTION PRESENTED

Is a state tax on a non-Indian contractor doing business with the United States on an Indian reservation pre-empted when Congress has not expressly provided for such pre-emption and there is no infringement on tribal sovereignty because no tribal funds are used and no tribe is a party to the contract?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the Arizona Court of Appeals is reported at 190 Ariz. 262, 947 P.2d 836 (App. 1997). Petition Appendix ("Pet. App.") 1. The Arizona Supreme Court's order denying review, with one justice voting to grant review, is unreported. Pet. App. 27. The Arizona Tax Court's judgment and minute entry order that the Arizona Court of Appeals reviewed are unreported. Pet. App. 28-29.

STATEMENT OF JURISDICTION

On April 29, 1997, the Arizona Court of Appeals, Division One, entered its judgment. On December 16, 1997, the Arizona Supreme Court denied the petition for review. Pet. App. 27. The Petition for Writ of Certiorari was filed in this Court on March 16, 1998, and was granted on May 18, 1998. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND REGULATORY PROVISIONS

The Appendix to the Petition contains pertinent portions of the Arizona Transaction Privilege Tax, A.R.S. §§ 42-1306, 42-1310.16 (Pet. App. 30); the Buy Indian Act, 25 U.S.C. § 47 (Pet. App. 33); the Federal Lands Highway Program, 23 U.S.C. § 204 (Pet. App. 34); and relevant portions of Bureau of Indian Affairs regulations governing road construction, 25 C.F.R. §§ 170.1 through 170.19

(Pet. App. 37), and self-determination contracts, 25 C.F.R. §§ 271.1 through 271.5 (Pet. App. 39).

STATEMENT OF THE CASE

By refusing to apply settled principles that establish state authority to impose non-discriminatory taxes on federal contractors and compounding this fundamental error by misapplying Indian law pre-emption standards to this case, the court of appeals' decision interjects unwarranted confusion into the already complex area of state taxation on Indian reservations. Previous decisions of this Court have focused on the identities of the parties engaged in commercial transactions, recognizing that federal law (1) categorically protects the United States, but not its contractors, from state taxation and (2) categorically protects tribes and tribal members, but not nonmembers who engage in commercial transactions with them, from state taxation unless Congress has expressly or by plain implication pre-empted state law. By relying on amorphous federal interests emanating from statutes and regulations that were never intended to deal with issues of state jurisdiction, the court of appeals' decision undermines this Court's attempts to provide doctrinal clarity to this area of state taxation. This Court should reverse the court of appeals and clarify that federal law does not prohibit state taxes on commercial transactions on Indian reservations between a nonmember, such as the United States, and another nonmember.

A. Facts.

The State of Arizona ("State") maintains a highway system across Arizona, and this system also includes Indian reservations. The State built and maintains the principal highways on the reservations (Pet. App. 19), but the Bureau of Indian Affairs ("BIA"), an agency of the United States, builds and maintains other reservation roads that feed into the State's system. Once built, all BIA roads must remain open to the general public. 23 U.S.C. § 101(a); 25 C.F.R. 170.8(a) ("Free public use is required on roads eligible for construction and maintenance with Federal funds under this part.").

Respondent, Blaze Construction Co., Inc. ("Blaze"), was a contractor that engaged in construction activities within Arizona. Pet. App. 2. The BIA awarded Blaze contracts to construct and repair roads on six Indian reservations located across Arizona.[1] Pet. App. 3. The BIA entered into the contracts pursuant to the Federal Lands Highways Program, which authorizes the Secretary of Transportation to establish a coordinated program for highway construction on a variety of federal lands, including highways through forests and public lands, and roads through Indian reservations. 23 U.S.C. § 204. No tribal funds were used to pay Blaze, although each tribe

[1] The contracts concerned road work on the following reservations: Colorado River (western Arizona, bordering and extending into California), Fort Apache (east-central Arizona), Hopi (northeastern Arizona), Navajo (northeastern Arizona, extending into Utah and New Mexico), Papago (Tohono O'odham) (south-central Arizona, bordering Mexico) and San Carlos (east-central Arizona).

worked with the BIA to plan the routes that the roads would take through the reservations, and Blaze hired reservation residents to work on the road construction. Pet. App. 3-4.

While some of Blaze's projects are in remote locations, many connect to or are near highways that the State maintains, and thus are essentially a part or an extension of the same highway system. JA 14, 16-20. For example, one project is actually an on-reservation extension of Arizona Route 77, providing better access to the off-reservation town of Holbrook and to Interstate 40. JA 16-17. Other projects provide improved access to the Canyon de Chelly National Monument, a popular tourist site, JA 17, and to Ganado High School, a state-funded public school. JA 16.

Blaze transports equipment and personnel over hundreds of miles of state highways to get to its projects scattered throughout Arizona. Pet. App. 4. While Blaze pays vehicle fees and use fuel taxes for its off-reservation use of state highways, these fees and taxes fund road maintenance, not the costs of general government. Ariz. Const. art. IX, § 14. Some of the contracts between Blaze and the BIA specifically provided for preconstruction conferences between Blaze and the BIA in Phoenix, which is located outside any Indian reservation. Pet. App. 4. All of the BIA contracts at issue were awarded and administered by BIA offices located outside any Indian reservation: the Navajo contracts were issued by the Gallup, New Mexico, office and the contracts on all other reservations by the Phoenix office. Superior Court Index of Record ("R") 7, Exhibits K-DD.

The BIA obtains its funding for road projects from the Federal Highway Administration on a project-by-project basis. JA 48-55, 57. While the BIA area offices receive general estimates as to funding available in any given year, nothing in the record indicates that more roads would be built on Arizona Indian reservations if no Arizona tax were imposed.[2]

The State does not claim that it provided direct services to the specific road projects that Blaze performed. Nevertheless, the State provided, and still provides, many services in addition to road maintenance on reservations. For example, the State provides millions of dollars in assistance to public schools serving the reservations. R 7, ¶¶ 13-21. In fiscal year 1991 alone, the Chinle Unified School District on the Navajo Reservation received over $12,000,000 in State payments. R 7, Exhibit F-7. An official study that the Arizona Legislative Council published in November 1995 ("ALC Study") determined that the State spends over $100,000,000 each year on elementary and secondary schools that serve on-reservation Indians. *See* Exhibit 2 to the State's Answering Brief at the Court of Appeals.[3] These education services benefit

---

[2] Blaze's only witness on the issue was not directly involved in the financing of projects, JA 54. Accordingly, that witness was not competent to testify as to the consequences of a state tax. He did testify that any unused funding is transferrable to any other BIA office and that the BIA Navajo area office had actually received unused funding from the Phoenix area office, which contracts for road construction for the other five reservations on which Blaze worked. JA 54.

[3] Blaze has objected to consideration of this official report because it was not introduced before the trial court, yet the

Blaze and its tribal member employees by providing for an organized, educated society, as do other on-reservation services such as law enforcement,[4] social services,[5] and child support enforcement.[6]

---

report was not actually published until after the dispositive motions were filed. Brief in Opp. at 3, n. 2. The ALC Study was submitted to the Arizona Court of Appeals, which may take judicial notice of official records of state agencies. *State ex rel. Smith v. Bohannan*, 101 Ariz. 520, 421 P.2d 877 (1966); 9 Wigmore, Evidence, § 2568a (Chadbourn rev. 1981). In any event, other documents in the record conclusively establish that the State spends tens of millions of dollars to fund public schools on Indian reservations. R 7, Exhibits F, G, H, I.

[4] *United States v. Patch*, 114 F.3d 131 (9th Cir. 1997) (holding that an Arizona sheriff's deputy patrolling a state highway within a reservation is authorized to stop and pursue law violators, including tribal members), *cert. denied*, 118 S.Ct. 445 (1997); *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996) (noting that Arizona law enforcement officers provided services at entertainment events on an Indian reservation); ALC Study at 33 (finding that the Arizona state police have a patrol group assigned almost exclusively to patrol state highways on the Navajo and Hopi reservations and that this group provided assistance to tribal police upon request).

[5] ALC Study at 29 (finding that the Arizona Long Term Care System spent more than $20,000,000 in fiscal year 1993 on services to on-reservation Indian residents); ALC Study at 32 (finding that the minimum cost to the State for Department of Economic Security administration and/or provision of all federal and state programs to eligible on-reservation Indians was $16,143,199 in fiscal year 1993).

[6] *See State v. Zaman*, 190 Ariz. 208, 946 P.2d 459 (1997) (holding that state courts have subject matter jurisdiction over a child-support and paternity action brought by an Arizona county attorney against a non-Indian father on behalf of an Indian mother and child), *cert. denied*, 118 S.Ct. 1167 (1998).

Moreover, Blaze's employees, Indian and non-Indian alike, are protected by Arizona workers' compensation laws and their associated administrative and judicial remedies.[7] If Blaze has any dispute with its employees or subcontractors, the Arizona courts will be the proper forum to resolve the issues.[8] Similarly, if Blaze or one of its non-Indian employees is a victim of a crime committed by a non-Indian, the only criminal law remedy will be prosecution by Arizona officials in Arizona courts.[9] The court of appeals itself recognized that the State furnishes substantial services to Blaze and tribal members. Pet. App. 24.

---

[7] State workers' compensation laws and procedures apply to private employers on Indian reservations. 40 U.S.C. § 290; *Begay v. Kerr-McGee*, 682 F.2d 1311 (9th Cir. 1982) (holding that Indians must pursue workers' compensation claim before the Arizona Industrial Commission).

[8] *See Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997) (holding that a state court has jurisdiction over a tort claim against a nonmember for an injury on public highway maintained by state); *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980) (holding that there was no federal court jurisdiction over contract dispute between a tribe and an architectural firm and a building contractor); *but see* 40 U.S.C. § 270b (providing for federal court jurisdiction over claims against the payment bond required of federal contractors).

[9] A state has exclusive jurisdiction over crimes committed by a non-Indian against other non-Indians on the reservation. *United States v. McBratney*, 104 U.S. 621 (1881); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that an Indian tribe's inherent sovereignty does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation).

Pursuant to Arizona Revised Statutes § 42-1310.16 (Pet. App. 30-33), the State assessed a transaction privilege tax on Blaze for its prime contracting work performed within the State, as it would for any other contractor working on or off a reservation. The Arizona transaction privilege tax is imposed as a percentage of a contractor's gross receipts from doing business within the State. The state tax applied to all federal contractors, including ones doing construction work on military bases and other federal property. Arizona Administrative Code § R15-5-604 ("Construction projects performed for the United States Government, state, cities, counties, or any agencies thereof, are taxable.").[10] Blaze protested the assessment.

B. Proceedings Below.

The Arizona Tax Court entered summary judgment for the State, holding that federal law does not pre-empt state taxation of a contractor doing business with the federal government on an Indian reservation. Pet. App. 28. The Arizona Court of Appeals reversed, holding that it was necessary to analyze a state tax on construction contracts with a federal agency for work done on an Indian reservation using the implied pre-emption principles that this Court has applied to the activities of non-

[10] Arizona does not impose its tax on tribal members who are contractors, because the legal incidence of the tax is on the contractor, or on nonmembers who are hired to do work for a tribe, tribal entity or tribal member. *See* Arizona Department of Revenue Transaction Privilege Tax Ruling TPR 95-11, CCH *Arizona State Tax Reporter* ¶ 300-192 (April 21, 1995).

Indians on reservations. Pet. App. 5-9. In doing so, the court of appeals rejected the State's argument that state taxation of federal contracts should be analyzed under the principles that generally apply to the state taxation of federal contractors – namely, that a state tax will be pre-empted only if it is imposed directly on the federal government or if a federal statute expressly pre-empts it. *See United States v. New Mexico*, 455 U.S. 720 (1982).

In applying an implied pre-emption test, the court of appeals found congressional intent to pre-empt the state tax arising out of the Buy Indian Act (25 U.S.C. § 47), which establishes a contracting preference for any Indian (Blaze is owned by a member of an Indian tribe located outside Arizona[11]) (Pet. App. 13, 15-16), and in BIA regulations concerning construction of reservation roads and implementation of the Indian Self-Determination and Education Assistance Act (25 C.F.R. §§ 271.1-271.5) (Pet. App. 12-13, 15-16). The court of appeals found that federal policies that these statutes and regulations reflected were similar to those found pre-emptive in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832

[11] Blaze's ownership by an Indian is not decisive here because this Court has held that a nonmember Indian stands on the same footing as a non-Indian for state tax purposes. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-1 (1980); *see also, Duro v. Reina*, 495 U.S. 676, 686 (1990) ("Exemption from state taxation for residents of a reservation, for example, is determined by tribal membership, not by reference to Indians as a general class.") and Blaze's Brief in Opposition at 2 n.1 ("Respondent concedes that for purposes of pre-emption analysis it stands in the same position as a non-Indian.").

(1982). The court of appeals declined to accept the State's argument that in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), this Court upheld a state tax in the face of considerably stronger federal interests and more comprehensive statutes than those applicable to Blaze's road construction contracts with the BIA. The court of appeals purported to distinguish *Cotton Petroleum* by holding that a state can tax nonmember activities on a reservation only when there is a *direct connection* between the taxed activity and state services or regulation. Pet. App. 24. It used this holding to distinguish the numerous Arizona and federal cases that had specifically upheld taxes on non-tribal members or on transactions that did not involve tribes or tribal members. Pet. App. 16-25.

The State filed a petition for review with the Arizona Supreme Court. The court denied the petition, with Justice Martone voting to grant review. Pet. App. 27.

SUMMARY OF ARGUMENT

Immunity from state taxation will be found only when "Congress has acted to grant . . . such immunity, either expressly or by plain implication." *Cotton Petroleum*, 490 U.S. at 175-76. State taxation of federal contractors is well accepted by Congress and the courts. No act of Congress pre-empts a state tax on federal contractors merely because they do business on Indian reservations. Reliance upon implied pre-emption, therefore, is particularly inappropriate where, as here, the federal government is a party to the taxed contracts because the federal

government is unquestionably aware of the taxation and it can unilaterally protect itself from state law.

Moreover, even if the implied pre-emption doctrine were applicable, it would only bar a state tax on federal contractors if the tax clearly and impermissibly interfered with federal or tribal interests. Indirect and insubstantial effects on tribes or the federal government are insufficient to divest states of their fundamental interest in imposing non-discriminatory taxes. State taxes on transactions that involve only non-tribal members are generally valid because they do not directly and substantially affect tribal interests. The court of appeals' interpretation of *Cotton Petroleum* as requiring a direct connection between state services and the nonmember activity being taxed is simply wrong and unworkable. While state services may be a relevant consideration in determining whether a state tax on nonmembers doing business on-reservation *with a tribe or its members* is pre-empted, the nexus between state services and business activities should be immaterial in determining whether a tax on nonmembers doing business with other nonmembers is pre-empted.

Finally, the court of appeals erred in basing its finding of federal pre-emption on the Buy Indian Act and the BIA regulations that implement the Indian Self-Determination Act. These provisions regulate the federal government's conduct in contracting with tribes and others, but they do not demonstrate "that Congress intended to remove all [state-imposed] barriers to profit maximization" with respect to such contracts. *Cotton Petroleum*, 490 U.S. at 180. Given Congress' general acquiescence in state taxation of federal contractors, congressional intent to

establish a different rule for contractors on Indian reservations should not be implied from the amorphous expressions relied upon by the court below. *See Cotton Petroleum*, 490 U.S. at 189 ("Unless and until Congress provides otherwise, each of the two sovereigns has taxing jurisdiction over all of Cotton's leases.").

ARGUMENT

The court of appeals committed the fundamental error of assuming that tribal sovereignty is adversely implicated by a state tax even when no tribe or tribal member is a party to the taxed transaction. This flawed premise caused the court below to find congressional intent to pre-empt state taxes in circumstances where the federal interests are considerably weaker and the federal statutes considerably less explicit than in cases in which this Court has held that there was no intent to pre-empt state law. The court further erred by reading into this Court's decisions a requirement that a state may tax commercial transactions between nonmembers that occur on Indian reservations only if there is a "direct connection" between state services and the taxed activity. Correction of these errors is essential to ensure the predictability in the law required for effective tax administration by eliminating the necessity for states and businesses to guess whether particular transactions are subject to state taxation. In sum, the court of appeals' ruling is contrary to the law as embodied in this Court's decisions, and therefore, should be reversed.

I. FEDERAL CONTRACTORS DOING BUSINESS ON INDIAN RESERVATIONS ARE TAXABLE UNLESS CONGRESS EXPRESSLY PRE-EMPTS THE TAX.

The court of appeals erred in holding that congressional intent to pre-empt state taxes on federal contractors who are doing business on Indian reservations may be implied in statutes that do not expressly provide for such pre-emption. Federal law bars a state tax only if the tax is imposed directly on the federal government or if the language of a federal statute expressly pre-empts the tax. *United States v. New Mexico*, 455 U.S. 720, 733-38 (1982). "[I]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." *Id.* at 734.

United States v. New Mexico illustrates the well-accepted principle that states may tax federal contractors. Accordingly, only an express act of Congress ordinarily pre-empts a state tax imposed on such contractors. *Cf. Cass County v. Leech Band of Chippewa Indians*, 118 S.Ct. 1904 (1998) (slip opinion at 9) ("[O]nce Congress has demonstrated (as it has here) a clear intent to subject the land to taxation by making it alienable, Congress must make an unmistakably clear statement in order to render it non-taxable."); *New York State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("[Where] federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' ").

The court of appeals disagreed, finding that the implied pre-emption doctrine applicable to cases involving transactions with tribal members also should apply in cases involving federal contractors operating on Indian reservations, primarily because this Court has never stated otherwise. Pet. App. 5-9. The court of appeals failed to recognize, however, that federal contracts are different from any other taxed activity because one of the parties to the contract – the United States – can unilaterally exempt itself and its contractors from any state tax. That unique fact distinguishes this case from this Court's prior cases. The Court's extension of the tax exemption of tribal members to nonmembers doing business on the reservation in previous cases was not based upon any implied congressional intent to protect nonmembers. Rather, it was based upon the recognition that the state taxes were effectively, albeit indirectly, taxes on a tribe or tribal member. *See, e.g., Bracker* (tax on tribal contractor who was reimbursed by tribe for amount of tax) and *Ramah* (tax on contracting services provided to tribal entity with contractor being reimbursed for full amount of tax paid).

This Court's early formulation of the implied pre-emption doctrine in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), explains why it is limited to those who are dealing with tribes. In *McClanahan*, this Court clarified that what distinguishes Indian pre-emption from general pre-emption is that "Indian sovereignty . . . provides a backdrop against which the applicable treaties and federal statutes must be read." 411 U.S. at 172. The Court consequently "examine[s] the language of the relevant federal treaties and statutes in

terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Bracker*, 448 U.S. at 144. Accordingly, if no tradition of tribal sovereignty or tribal immunity from state law exists with regard to a particular activity, there are no tribal interests that weigh in favor of determining that Congress intended to pre-empt state taxing jurisdiction. *See Cotton Petroleum*, 490 U.S. at 182 ("There is, accordingly, simply no history of tribal independence from state taxation of these lessees to form a 'backdrop' against which the 1938 Act must be read."); *Rice v. Rehner*, 463 U.S. 713, 720 (1983) ("If, however, we do not find such a tradition, . . . our pre-emption analysis may accord less weight to the 'backdrop' of tribal sovereignty."); *see also Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1409 (1997) ("In the main, the Court explained, 'the inherent sovereign powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – 'do not extend to the activities of nonmembers of the tribe.' ").

The court of appeals relied upon tribal interests in regulating inside a reservation's boundaries as the basis for an assertion that the tax here might implicate tribal sovereignty. Pet. App. 7-8. It is true that this Court in *Bracker* identified "a geographical component to tribal sovereignty," (448 U.S. at 150), but this Court's subsequent holding in *Cotton Petroleum* clearly rejected mere geography as a substantial consideration in the pre-emption analysis. Instead, *Bracker* is plainly more properly understood as holding that the comprehensive statutory scheme at issue there demonstrated Congress's manifest intent to pre-empt that particular state tax.

Moreover, the court of appeals failed to grasp the vital element embodied in this Court's decisions – namely, that the identity of the contracting parties is of central importance in any Indian law analysis and that *federal* sovereignty in not interchangeable with *tribal* sovereignty. *Blaze Construction Co. v. Taxation & Revenue Dep't*, 118 N.M. 647, 884 P.2d 803, 805-6 (1994), *cert. denied*, 514 U.S. 1016 (1995). When a contract involves only the federal government and a nonmember of the tribe, the implied pre-emption doctrine is inapplicable because its essential purpose – protecting tribal interests from unwarranted state-law intrusion – is simply not implicated. Moreover, federal interests do not need the protection of the implied pre-emption doctrine because the federal government can protect itself and its contractors directly, rather than by implication, if Congress deems such protection warranted.

Taxation of federal contractors is a matter peculiarly within the scope of congressional authority because Congress must authorize and fund the underlying projects. "Congress is [therefore] in a position to weigh and accommodate the competing policy concerns and reliance interests [involved]." *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 118 S.Ct. 1700, 1705 (1998). If Congress wishes to pre-empt state taxes on federal contractors who do work on Indian reservations, it can easily do so.[12] Its

[12] *See, e.g.*, 5 U.S.C. § 8909(f) (barring any state tax, fee or other monetary payment with respect to health payments made to a carrier by the United States); 15 U.S.C. § 381 (Pub. L. 86-272) (limiting state power to impose an income tax on interstate commerce); 49 U.S.C. § 11501 (Railroad Revitalization & Regulatory Reform Act) (limiting state taxes that discriminate against rail transportation property); 49 U.S.C. § 40116 (limiting state power to tax air commerce).

failure to do so here leaves in place the general rule that state taxes on federal contractors are permissible unless Congress expressly pre-empts them.

II. A STATE TAX ON NONMEMBER FEDERAL CONTRACTORS IS NOT IMPLIEDLY PRE-EMPTED BECAUSE CONGRESS HAS NOT SHOWN BY PLAIN IMPLICATION ITS INTENT TO BAR A TAX ON SUCH TRANSACTIONS.

Even if pre-emption of a state tax can be implied from federal law, the cloak of tax immunity that the tribes enjoy does not extend to nonmembers or the federal government. This Court's precedents establish that state taxes on commercial transactions between nonmembers on reservations are generally valid, absent a clearer expression of congressional intent to pre-empt state law than exists here. Application of this general rule provides certainty and promotes "the reality that tax administration requires predictability." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 456-60 (1995). By focusing on an ascertainable and objective fact – the identity of the parties – this rule encourages predictability, discourages litigation, and provides symmetry with this Court's categorical rule that state taxation of Indian tribes and tribal members with respect to on-reservation matters is presumed to be invalid. *See Chickasaw Nation*, 515 U.S. at 457-60. The court of appeals erred by ignoring the controlling importance of the identity of the contracting parties to any implied pre-emption analysis, finding the

extent of services that Arizona provides to be determinative and reading congressional intent to pre-empt state taxation into statutes that are not related to issues of state taxation or jurisdiction.

A. State Taxes on Non-Tribal Members are Generally Valid.

The starting point of any analysis of state or tribal jurisdiction on an Indian reservation must be the identity of the party. This is true in both tax and non-tax cases. *See Strate*, 117 S.Ct. at 1409 (finding that there was no tribal court jurisdiction over a nonmember defendant for a tort on a public highway maintained by state); *Chickasaw Nation*, 515 U.S. at 457-60 (holding a state fuel tax imposed directly on a tribe invalid); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) (finding that a tribal owner of land was subject to property tax but not to excise tax); *Montana v. United States*, 450 U.S. 544 (1981) (finding that there was no tribal jurisdiction over non-Indian on fee land within the reservation); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that there was no tribal criminal jurisdiction over non-Indians).

In tax cases utilizing the implied pre-emption analysis, this Court has repeatedly noted the overriding importance of the parties' identities in such an analysis. In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) and *Cotton Petroleum*, this Court upheld state taxes on nonmembers, primarily because the taxes were imposed on nonmembers and not on a tribe. In *Cotton Petroleum* this Court noted that "[i]t is important

to keep in mind that the primary burden of the state tax falls on the non-Indian taxpayers." 490 U.S. at 187 n.18; *see also Department of Taxation & Revenue v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (holding that the Indian trader statutes did not prevent a state from imposing burdens on sales by wholesalers to Indian retailers who in turn sold to non-Indian consumers). While the Court has been willing to look beyond the bare legal incidence of the tax under state law when the tax is directly passed on to a tribe or tribal member, *see Ramah*, *Bracker* and *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), the deciding factor has consistently been whether the tax is actually a tax on Indians.[13]

These decisions reflect this Court's determination that federal statutes will not be given a broad interpretation when their primary effect is to pre-empt a tax on nonmembers. A state's interest in nonmember activities throughout the state will be assumed and accepted absent direct and substantial interference with federal law. Concurrent jurisdiction over nonmembers, based on the shared sovereignty of the states and tribes over nonmembers, allows both entities to tax transactions that do not involve a tribe or tribal members. *Cotton Petroleum*, 490 U.S. at 188-89.

---

[13] This Court's consistent sustaining of taxes on nonmembers actually supports a presumption that state taxes on commercial transactions between non-tribal members are valid. *See County of Yakima*; 502 U.S. at 257-58 ("[t]his Court's most recent cases have recognized the rights of States, absent congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands").

Recognition that a state has significant interests in transactions between nonmembers on Indian reservations is consistent with the principle that Indian pre-emption analysis involves a balancing of federal, tribal, and state interests, and that "the traditional notions of Indian sovereignty provide a crucial 'backdrop' against which any assertion of state authority must be assessed." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983). This Court has held that tribal sovereignty over nonmembers is limited. *Montana v. United States*, 450 U.S. 544, 565 (1981) ("[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."); *see also South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993), *quoting Montana*, 450 U.S. at 564 ("[A]fter *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation.' ").

Using the limited tribal sovereignty over nonmembers as a "backdrop" for pre-emption analysis compels the conclusion that federal law generally does not pre-empt a state tax on commercial transactions between nonmembers. Thus, the general rule that federal contractors are taxable by the state should be recognized unless Congress provides otherwise "by plain implication." *Cotton Petroleum*, 490 U.S. at 175-6, 189 ("Unless and until Congress provides otherwise, each of the other two sovereigns has taxing jurisdiction over all of Cotton's leases."). Congress has not done so here.

B. The Court of Appeals' Decision Conflicts with This Court's Decision in *Cotton Petroleum* by Requiring a State to Show a Direct Connection Between State Services and the Activities Taxed, Even When the Activities Do Not Involve Any Tribal Members.

The essential underpinning of the court of appeals' implied pre-emption analysis is that there must be a *direct* connection between state services and the specific nonmember activity being taxed to validate the state tax. This novel requirement is not and should not be the law. This Court has considered state services in its implied pre-emption analysis because it recognizes that a state can establish that the services that it provides justify the tax even though the tax may be viewed to some extent as inconsistent with federal and tribal interests. *See Mescalero Apache Tribe*, 462 U.S. at 334 ("State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, *unless* the state can justify the assertion of state authority.") (emphasis added). A state does not, however, need to justify a tax with a showing of corresponding state services when the tax is imposed on a nonmember doing business with the United States because such a tax does not interfere with federal and tribal interests.[14]

---

[14] The Ninth Circuit has correctly recognized that the scope of state services is entitled to little weight in determining whether a state tax on transactions between non-members is pre-empted. *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 853 (1998) (rejecting the proposition that a tax on transactions between non-Indians

The clear weight of authority is that a state tax on transactions that involve only nonmembers is not preempted even though extensive federal regulation exists and the tax has economic or regulatory effects on a tribe. *See, e.g., Milhelm Attea*, 512 U.S. at 74-75 (holding that the Indian trader statutes do not prevent a state from imposing burdens on sales by wholesalers to Indian retailers who in turn sell to non-Indian consumers); *Cotton Petroleum* (upholding state tax on non-Indian lessee's oil production); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. at 153-59 (upholding state tax on non-member purchasers of tobacco products from tribal retailers); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930) ("[R]eservations are part of the state within which they lie, and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards."); *Thomas v. Gay*, 169 U.S. 264 (1898) (holding that a territorial legislature may tax non-Indian-owned cattle on Indian reservation).

In *Cotton Petroleum*, this Court upheld state severance taxes on a nonmember lessee's on-reservation production of oil and gas in the face of tribal and federal interests significantly greater than those at stake here. 490 U.S. at 185. The court of appeals misconstrued *Cotton Petroleum* when it found that the decision *required* that there be a

---

must be "narrowly tailored" to services provided to the reservation); *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1239 (9th Cir. 1996) ("The Tribe's insistence that there be a direct connection between the state sales tax revenues [from nonmembers] and the services provided to the Tribe is similarly meritless.").

direct connection between the state services and the taxed activities to validate a state tax. In fact, *Cotton Petroleum* specifically rejected the notion that there must be a *quid pro quo* relationship between a taxpayer and the State. *Id.* at 185 n.15. Moreover, this Court's discussion of general services that the State of New Mexico provided to Cotton and the tribe demonstrates that the relevant services were not limited to those that were directly connected to the taxed activity. Indeed, in rejecting Cotton's claim that the state tax was invalid because the amount of tax paid exceeded the value of services provided by the State, this Court held that "the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it." *Id.* at 189. Therefore, a direct connection with the taxed activity is not required.

Moreover, the Court's discussion of services in *Cotton Petroleum* was actually directed at determining whether the "state provides the benefits of an organized and civilized society to all of its citizens, [Indian] and non-Indian alike, and to businesses, including Cotton, extracting oil and gas in the state." *Id.* at 171 n.8. As the Court stated:

> The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government – that it exists primarily to provide for the common good.

Id. at 190 (quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-523 (1937)). Nothing in *Cotton Petroleum* supports the conclusion that this "fundamental principle of government" does not apply to Blaze's activities on Indian reservations.

While state services have been discussed as one of many factors relevant to a consideration of the tribal, federal, and state interests at stake, the provision of state services has been important only when the state tax was imposed on someone with whom a tribe or tribal member did business and the economic incidence of the tax was passed on to the tribe or its members. *Cotton Petroleum* demonstrates this in its discussion of the *Ramah* and *Bracker* cases. There, the Court did not discuss state services in the context of analyzing congressional intent as reflected in the relevant federal laws, but only as a counterweight to the recognition that the taxes imposed in *Ramah* and *Bracker* were actually burdens on the tribes. *Id.* at 184-85. In both cases, the taxes were imposed on tribal contractors and were passed on to the tribes. Where no tribe is a party to a transaction, the existence of state services should be a factor of no import because the state has the power to impose the tax unless Congress has plainly legislated to the contrary.

Nonetheless, even if the provision of state services is relevant where the tax is imposed on a transaction between nonmembers, both Blaze and the court of appeals understate the scope of relevant state services by focusing only on direct services, thereby ignoring the State's provision of the "intangible value of citizenship in an organized society." *Id.* at 189. If Blaze's operations are trouble free, state involvement in its activities may

indeed be minimal. If, however, any of its employees are injured on the job and make a workers' compensation claim, it has a dispute with its employees or subcontractors, or it is a victim of a crime committed by a non-Indian, the benefits of the organized society provided by the State of Arizona will be apparent.

Blaze is a nonmember doing business within Arizona. It benefits from the services provided by the State, and there is no requirement that the State prove the validity of its tax by establishing a direct connection between state services and the taxed activities. Such a requirement has never been imposed by this Court and is contrary to the "fundamental principle of government," recognized in *Cotton Petroleum* as applying to nonmembers doing business within Indian reservations, that taxes exist primarily for the common good, not as compensation for services rendered to the taxpayer. The court of appeals' contrary ruling should be reversed.

C. This Case Does Not Involve a Federal Regulatory Scheme That Evidences Congressional Intent to Pre-empt a State Tax on Federal Contractors.

The lower court further erred in finding that federal regulation of on-reservation road construction evidences congressional intent to pre-empt state law. The court of appeals found *Bracker* and *Ramah* controlling on this point, but in doing so relied upon surface similarities with the statutory schemes at issue in those cases. Those statutory schemes are plainly distinguishable from those

at issue here, especially when viewed against the "backdrop" of Indian sovereignty. While tribal sovereignty was a central issue in both *Bracker* and *Ramah* because the state taxes were imposed on tribal contractors who were paid with tribal funds, it is not an issue here because the contractors are not doing business with any tribe and are paid with federal, not tribal, funds.

Bracker involved federal statutes regulating the sale of reservation timber owned by the tribe. *Bracker*, 448 U.S. at 146-47. The BIA was authorized, and required, to manage the timber for the benefit of its owner and was granted power to determine the disposition of the proceeds from timber sales. The state taxes at issue were imposed on a nonmember contractor hired by the tribe to harvest timber in return for a contractually specified fee. *Id.* at 139. The tribe agreed to reimburse its contractor for any tax liability incurred as a result of its on-reservation activities. *Id.* at 140. The Court held that the federal regulatory scheme was "so pervasive as to preclude the additional burdens sought to be imposed in this case." *Id.* at 148. In reaching this holding the Court noted that the federal government was responsible for reviewing and approving the contracts between the tribe and its contractors, and that the economic burden of the asserted taxes would fall on the tribe. *Id.* at 149, 151.

In *Ramah*, the state had closed the only public high school that served the Ramah Navajo children. *Ramah*, 458 U.S. at 834. A tribal organization was formed to operate a local school. *Id.* This organization received federal funds specifically earmarked by Congress for the design and construction of a new school. *Id.* at 835. This Court found that federal law specifically encouraged

Indian-controlled institutions, comprehensive regulations had been developed respecting school construction for schools controlled and operated by tribes, and, as in *Bracker*, the economic burden of the tax fell on the tribe. *Id.* at 840-41.

In both *Bracker* and *Ramah*, this Court found a comprehensive federal regulatory scheme that demonstrated a congressional intent to pre-empt state law because its purpose was to regulate on-reservation dealings with tribes. In both cases the economic burden of the tax was on the tribe and the money to pay any tax would necessarily come directly from tribal treasuries. These facts were essential as a "backdrop" to the Court's decisions. Federal regulation is not controlling in pre-emption analysis unless the purpose of that regulation plainly supports congressional policies to protect tribes and their members from impermissible state taxes. The court of appeals erroneously equated any federal regulation of on-reservation activities with the comprehensive regulatory schemes found to be pre-emptive in *Bracker* and *Ramah*. This conclusion is plainly contrary to the general rule applied by this Court in *United States v. New Mexico* that taxes on federal contractors are not barred even though the tax is ultimately borne by the United States and the contractor's activities are completely controlled by the federal government.

Even more importantly, equating federal regulation with federal pre-emption of state taxation is plainly contrary to this Court's decisions in *Cotton Petroleum* and *Milhelm Attea*. *Cotton Petroleum* involved a challenge to a state severance tax on the production of oil and gas on an Indian reservation. *Cotton Petroleum*, 490 U.S. at 156. The

mineral leases in *Cotton Petroleum* were subject to federal regulation at least as comprehensive as that present in *Bracker* and *Ramah*, yet this Court upheld the state tax. The Court emphasized that the primary burden of the tax was on non-Indians, *id.* at 187 n.18, and that federal regulation was not exclusive because the nonmember taxpayer was subject to some state law. *Id.* at 186. *Bracker* and *Ramah* were distinguished as involving complete abdication or noninvolvement of the state in the on-reservation activities and because the taxes were passed on to the tribes. *Id.*

This Court's decision in *Milhelm Attea* also rejected the argument that comprehensive federal regulation of on-reservation activities inevitably leads to pre-emption of any state tax on those activities. 512 U.S. at 70-78. In *Milhelm Attea* enrolled tribal members purchased cigarettes and resold them to nonmembers. *Id.* at 64-65. The State of New York adopted regulations to require that wholesalers precollect state tax on sales intended for resale to nonmembers. *Id.* The taxpayer challenged the regulations as being pre-empted by the federal Indian Trader Statutes, 25 U.S.C. § 261 *et seq.*, because the regulations imposed actual burdens on sales to tribal members. *Id.* at 67-69. This Court rejected that challenge, noting that "[a]lthough language in *Warren Trading Post* suggests that no state regulation of Indian traders can be valid, our subsequent decisions have 'undermine[d]' that proposition." *Id.* at 71, quoting *Central Machinery Co. v. Arizona State Tax Comm.*, 448 U.S. 160, 172 (1980) (Powell, J., dissenting). The Court found the purpose and effect of state regulation was to impose taxes on nonmembers, and that the state had not sought to control "the kind and

quantity of goods and the prices at which such goods shall be sold to the Indians." *Id.* at 75, quoting 25 U.S.C. § 261. The Court looked beyond the bare existence of comprehensive federal regulation, and found no congressional intent to bar state taxes ultimately borne by nonmembers.

Cotton Petroleum and *Milhelm Attea* illustrate the principle that comprehensive federal regulation of a reservation activity is not enough to pre-empt a tax on nonmembers doing business on an Indian reservation. One of this Court's most recent decisions relating to state taxation on reservations reinforces this point. In *Montana v. Crow Tribe*, 118 S.Ct. 1650, 1652 (1998), this Court described *Cotton Petroleum* as a "pathmarking decision," and stated:

> *Cotton Petroleum* clarified that neither the IMLA, nor any other federal law, categorically pre-empts state mineral severance taxes imposed, without discrimination, on all extraction enterprises in the State, including on reservation operations. "Unless and until Congress provides otherwise, each of the . . . two sovereigns [– State and Tribe –] has taxing jurisdiction over all [on-reservation production]."

Id. at 1660. In this case, the Court should employ the same method of interpreting congressional action and decline to read pre-emption into congressional silence.

Bracker and *Ramah* involved statutory schemes that this Court interpreted as implicitly and unequivocally barring any state taxes imposed on transactions with tribes when the tax will plainly have to be paid out of the contractor's receipts of tribal funds. *Cotton Petroleum* and

Milhelm Attea, on the other hand, involved state taxation of on-reservation transactions where the tax was not directly passed on to the tribe. In all four cases there were economic effects on the tribe and comprehensive federal regulation, but federal pre-emption existed only when the effect of barring the state tax was to protect tribes and their members from direct and substantial effects of state law. There is no federal pre-emption when the primary effect is to protect nonmembers.

This Court's analysis of congressional intent in *Cotton Petroleum* and *Milhelm Attea* demonstrates why the court of appeals erred in its finding of federal pre-emption in the Buy Indian Act and the BIA regulations implementing the Indian Self-Determination Act. These provisions regulate the federal government's conduct in contracting with tribes and others, but they in no way demonstrate "that Congress intended to remove all [state-imposed] barriers to profit maximization." *Cotton Petroleum*, 490 U.S. at 180.

The Buy Indian Act, 25 U.S.C. § 47, merely requires the federal government to prefer vendors who are members of recognized Indian tribes. The court of appeals found that a member of the tribe where the contract was performed, who would not be taxable by the State, would enjoy an advantage over a member of a different tribe, who would be taxable. It found in this fact a basis for concluding that there was congressional intent to pre-empt state law. The statute contains no evidence of pre-emptive intent. Nothing in the Buy Indian Act remotely suggests that Congress intended to change the rule that tribal sovereignty does not protect nonmembers from state laws, even if the nonmember is enrolled in a separate recognized tribe. More broadly, the rule has been

established since 1980 when this Court decided in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. at 160-1, that nonmember Indians are to be treated as non-Indians for state tax purposes, yet Congress has not acted legislatively to mandate a different rule.[15]

The court of appeals' reliance on the regulations implementing the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, is even more misplaced.[16] Most importantly, this Court has rejected the suggestion that the Self-Determination Act has any broad pre-emptive effect on taxes imposed on non-Indians. *Cotton Petroleum*, 490 U.S. at 183 n.14; *Colville*, 447 U.S. at 155. The court of appeals therefore did not rely on the Act itself, but on the BIA regulations adopted under the Act that express "the policy of the Bureau." Pet. App. 13, 40, citing former 25 C.F.R. § 271.4(d) and (e). It is plain that the lower court's analysis, rather than being rooted in congressional intent,

---

[15] In contrast, following the ruling in *Duro v. Reina*, 495 U.S. 676 (1990), that tribal courts do not have criminal jurisdiction over nonmember Indians, Congress responded quickly. *See* Pub. L. No. 101-511, 104 Stat. 1856, 1892-93 (1990); Pub. L. No. 102-137; 105 Stat. 646 (1991) (giving tribes such jurisdiction).

[16] Congress originally enacted the Indian Self-Determination Act in 1975. Pub. L. 93-638, Jan. 4, 1975, 88 Stat. 2203. Congress has amended the Act numerous times, most significantly in 1988, 1990 and 1994. Pub. L. 100-472, Oct. 5, 1988, 102 Stat. 2285; Pub. L. 101-644, Nov. 29, 1990, 104 Stat. 4665; Pub. L. 103-413, Oct. 25, 1994, 108 Stat. 4250. None of these amendments is controlling here, and neither the court of appeals nor the Respondent relies upon, or even cites to, the language of the statute itself. Pet. App. 13; Brief in Opp. 11. The time period at issue here is June 1, 1986, to August 31, 1990. Pet App. 2-3.

rests only on a BIA policy unrelated to state taxation. In addition, because no tribe was a party to any of the contracts, the contracts at issue were not even regulated by the Self-Determination Act regulations. Reliance on the Act as an example of a comprehensive federal regulatory scheme governing the taxed activity is therefore plainly erroneous. Moreover, the Court has long been wary of relying solely on the pervasiveness of federal regulations in deciding whether state law should be pre-empted. *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 716-717 (1985). This is because administrative agencies generally tend to adopt extensive regulations without meaning to divest states of regulatory authority and because it is relatively easy for federal agencies to make clear and unambiguous their intention to pre-empt state law. *Id.*[17]

Blaze's argument concerning self-determination, which the court of appeals accepted, is that imposition of the State tax might affect a tribe's decision whether to assume the federal function of road construction and maintenance. Blaze argues that because tribal contractors are not taxable under Ramah, but federal contractors are taxable, a tribe would actually save money by doing the work itself. Therefore, the argument continues, a tribe would be "penalized" by not undertaking these projects

[17] Similarly, the BIA regulations governing road construction, 25 C.F.R. §§ 170.1 – 170.19, cannot be interpreting as evidencing congressional intent to pre-empt state law because they merely regulate agency procedures and are not based on any statute addressing tribal sovereignty or self-government.

itself because the state's law results in the federal government having to pay more for the project and having less money with which to provide services to the tribe. This argument is unsupported by either the language or policy of the Act, or by any facts; its only support is Respondent's tortured hypothetical. The BIA regulation itself simply provides that "the policy of the Bureau" is not to impose sanctions on Indian tribes with regard to contracting or not contracting. The plain purpose behind this policy is to prevent the BIA itself from coercing any tribe into contracting, or not contracting, with a threat of a reduction in services. No such coercion exists here. It simply cannot be the law that every state law that increases the cost to the federal government of providing a service to a tribe is pre-empted.

Moreover, nothing in the Act implies that Congress intended to prevent a tribe from benefiting from its independent sovereignty to lower one of its costs of providing services – namely, state taxes. Congress has sought to provide funding to contracting tribes that is at least equal to that necessary to provide the level of service previously provided by the federal government. 25 U.S.C. § 450j-1(a)(1), as added Pub. L. 100-472 (1988) ("The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract."). Nevertheless, if a tribe can save money through its own management or because of its sovereignty, it can use the money saved to provide additional services. *See* 25 U.S.C. § 450j-1(a)(3), added by Pub. L.

100-472 (1988), struck by Pub. L. 103-413, § 102(14)(C)(1994) ("Any savings in operation of a self-determination contract shall be utilized to provide additional services or benefits under the contract or be expended in the succeeding fiscal year as provided in section 13a of this title."). At bottom, nothing in this regulatory scheme evinces any clear intent to pre-empt Arizona's tax in this case.

To the extent Congress has expressed any regulatory intent with respect to roads on Indian reservations, its position has been to treat them the same as any other federally funded roads. Thus, the Federal Land Highways Act unambiguously expresses congressional intent to treat federal roads on Indian reservations in the same manner as other federal roads. Congress stated in 23 U.S.C. § 204(a) as follows:

> Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on Federal-Aid systems, there is established a coordinated Federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways, and Indian reservation roads as defined in section 101 of this title.

Pet. App. 34, added by Pub. L. No. 97-424, 96 Stat. 2097 (1983). At the very least, this statute offsets any implication in other statutes of congressional intent to treat Indian reservation roads different than other federal roads.[18]

---

[18] More importantly, 23 U.S.C. § 204 demonstrates congressional intent to apply uniform federal policies to all federal roads, including policies concerning state taxation. Less than a year before Congress enacted the statute, this Court decided *United States v. New Mexico*, which upheld a state's authority to tax federal contractors. Congress was certainly aware that state taxes applied to federal contractors, and there could have been little question that under a uniform program states would tax contractors building federal highways on forest and public lands, and on Indian reservations.

Ironically, the court of appeals read the Buy Indian Act and the Self-Determination regulations in an expansive manner to find an implied congressional intent to pre-empt the state tax, but it read the Federal Land Highways Act very differently. It found that "[b]ecause 23 U.S.C. § 204 makes no mention of state taxation of federal contract proceeds, it does not support the view that Congress intended it to address this state taxation topic." Pet. App. 14-15. The court of appeals' disparate treatment of these statutes and regulations, none of which mentions state taxation, highlights the absence of any solid doctrinal footing to its decision.

* * *

Cotton Petroleum and *Milhelm Attea* show that federal regulation of on-reservation activities cannot be equated with federal pre-emption of state taxation. Given Congress' general acquiescence in the state taxation of federal contractors, congressional intent to establish a different rule for contractors on Indian reservations should not be implied lightly. By reading congressional policies to pre-empt taxation into statutes that are unconnected to issues of state taxation, sovereignty, or jurisdiction, the court of appeals' decision provides little guidance to federal contractors, federal agencies, or the states as to whether

federal law pre-empts state taxes on specific transactions. The decision creates confusion by ignoring the central question – whether tribal interests are affected because the state tax burdens a tribe or tribal member. It replaces the analysis grounded in this inquiry with an unpredictable structure unrelated to congressional intent. Under the decision below, federal pre-emption will hinge on whether a particular contract is issued under the Buy Indian Act or whether the work may be done by a tribe pursuant to a contract with the BIA. There is no evidence that Congress intended any of its legislation governing federal contracts to be read so broadly or to cause such unpredictable results.

While this Court has required some balancing of tribal, federal, and state interests in determining the validity of state taxes imposed on nonmembers doing business on-reservation with tribes or their members, it has never applied the test that the court of appeals devised, which ultimately looks to whether the court thinks that the federal government – and indirectly the tribes – might be better off if there were no state tax. This is contrary to the central holding in *Cotton Petroleum* that a state's sovereign interests in exercising jurisdiction throughout its territory will not be set aside based on the kind of vague and undefined federal and tribal interests relied upon by the court of appeals in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals' decision.

Respectfully submitted,

GRANT WOODS
Attorney General of Arizona

C. TIM DELANEY
Solicitor General

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

PATRICK IRVINE*
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8384

Counsel of Record

July 20, 1998